86-1682

No. _____

FILED
FEB 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

MANFRED R. WETZEL,

Petitioner,

v.

ARIZONA STATE REAL ESTATE DEPARTMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

MANFRED R. WETZEL
3745 North 24th Street
Phoenix, Arizona 85016
(602) 264-5317
In Propria Persona

I.

QUESTIONS PRESENTED FOR REVIEW

A. DID THE ARIZONA STATE REAL ESTATE DEPARTMENT DENY PETITIONER'S DUE PROCESS RIGHT TO A FAIR HEARING BY PERMITTING THE OFFENSIVE USE OF THE DOCTRINE OF COLLATERAL ESTOPPEL WHEREBY PETITIONER WAS DENIED THE OPPORTUNITY TO ATTACK THE FINDINGS OF FACT MADE BY THE ARIZONA SUPREME COURT IN AN EARLIER DISBARMENT HEARING INVOLVING THE PETITIONER?

B. WAS PETITIONER DENIED DUE PROCESS BY THE HEARING OFFICER'S REFUSAL TO ISSUE SUBPOENAE AT PETITIONER'S REQUEST FOR CERTAIN WITNESSES WHO WOULD TESTIFY CONCERNING PETITIONER'S REPUTATION FOR HONESTY, BECAUSE THOSE WITNESSES HAD TESTIFIED DURING THE DISBARMENT HEARING?

II.

PARTIES TO THE PROCEEDING BELOW

The caption of the case in this Court contains the names of all parties in the matter.

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V.

OPINION BELOW

The opinion of the Court of Appeals of the State of Arizona, Wetzel v. Arizona State Real Estate Department, 1 CA-CIV 8568, filed July 24, 1986, is not yet reported. A copy is attached as Appendix B.

VI.

JURISDICTION

The decision of the Court of Appeals of the State of Arizona was entered on July 24, 1986. Appendix B. That court has denied Petitioner's timely Petition for Review on November 4, 1986. Appendix C. This Petition for Writ of Certiorari is being filed within 90 days of November 4, 1986. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

VII.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment of the United States Constitution, Section 1, provides in pertinent part that "{n}o State shall . . deprive any person . . property {} without due process of law ."

VIII.

STATEMENT OF THE CASE

A. Procedural History:

On October 14, 1983, the Local Administrative Committee for District Number 5A of the State Bar of Arizona recommended to the State Bar's Disciplinary Board that Petitioner, Manfred R. Wetzel, be disbarred. The Disciplinary Board adopted the Local Administrative Committee's recommendation on December 10, 1983, and forwarded the matter to the Arizona Supreme Court on December 22, 1983. The Arizona Supreme Court, in an opinion dated August 8, 1984,

ordered Petitioner's immediate disbarment. That opinion contained certain findings of fact concerning Petitioner.

On October 22, 1984, the Arizona State Real Estate Department ordered the summary suspension of Petitioner's real estate broker's license, relying entirely on the Arizona Supreme Court's opinion in the disbarment hearing. Appendix D. Following a hearing before the Real Estate Department, the Real Estate Commissioner ordered revoking Petitioner's real estate broker's license. Appendix E. Thereafter, Petitioner sought administrative review of the Commissioner's order before the Superior Court of the State of Arizona, which court affirmed the order for revocation on July 28, 1985. Appendix F. Petitioner took appeal to the Court of Appeals of the State of Arizona, which court entered its order affirming the revocation of Petitioner's real estate

license on July 24, 1986. A timely Petition for Review was denied on November 4, 1986.

B. Facts Relevant to Petition:

At all times material to this action, Petitioner, Manfred R. Wetzel, held both a license to practice law (until his disbarment on August 8, 1984) and a real estate broker's license.

By a notice dated April 13, 1983, Petitioner was ordered to appear before the State Bar Disciplinary Committee on May 19, 1983, to respond to charges made in the Committee's formal complaint against him. Petitioner sought diligently to retain counsel to represent him before the Committee, but was unable to do so before Friday, May 13, 1982, less than a week before the hearing.

Because of the volume of the record under review, which covered several years, counsel for Petitioner sought a

continuance in order to adequately prepare for the hearing, but that request was denied, and the hearing was held as scheduled on May 19, 1983. Petitioner's counsel renewed his request for continuance, T., 5/19/83, at 11,[1] which was again denied. Petitioner's counsel "reserved all cross-examination," Id., at 27, on the ground that he was unable to provide effective representation because of his lack of adequate preparation time. Citing the same grounds, Petitioner's counsel failed to present a defense on Petitioner's behalf. T., 5/20/83, at 75-76. At that point, the hearing was recessed until May 31, 1983. The Committee Chairman indicated that the recess was to give Petitioner and his counsel time to prepare a defense. Id.,

---

[1] "T" followed by a date and page refers to the transcript of the hearing held on that date.

at 79. Petitioner's counsel responded that the time was not adequate. Id., at 80-81.

On May 31, 1983, Petitioner's counsel renewed his objections that the entire matter should have been continued. T., 5/31/83, at 7. He further asserted that by the time the continuance was granted, a fundamental error had occurred which could not be remedied by the continuance. Id., at 9.

The Committee recommended Petitioner's disbarment on October 14, 1983, and on December 12, 1983, the Board unanimously accepted and affirmed the Committee's findings and adopted the Committee's recommendation for disbarment.

On August 8, 1984, the Arizona Supreme Court affirmed the Board's action and ordered the disbarment of Petitioner.

On October 22, 1984, Petitioner was served with notice of the summary

suspension of his real estate broker's license, along with a formal complaint for permanent revocation of the license, citing only the Arizona Supreme Court's opinion as grounds for the suspension and revocation. A hearing was set on the matter for November 15, 1984. Petitioner appeared on his own behalf.

Petitioner requested that the hearing officer issue certain subpoenae for witnesses who would testify concerning the matters enumerated in the findings of fact of the Arizona Supreme Court. T., 11/15/84 at 8-10. Petitioner pointed out that collateral estoppel was inoperative in this instance, because the issues under review were not identical. Id. at 12. The issue before the Real Estate Department had to do with Petitioner's reputation in the community for honesty, and the witnesses he sought to subpoenae were for the purpose of demonstrating that he had a good reputation. Id. at 8, 12 and 19.

Among the witnesses Petitioner sought to call was a Mr. Stormberg, who would testify that he was the husband of one of the complaining witnesses in the disbarment hearing and that his wife had lied during those proceedings. Id. at 9. Petitioner made an offer of proof that this witness would testify voluntarily and that this evidence had only been discovered after the disbarment hearing. Id. Stormberg, however, required a subpoena in order to arrange for time off from work to appear at the hearing. Id. at 23.

The hearing officer denied Petitioner's requests for subpoenae on the grounds that the matters enumerated in the opinion of the Arizona Supreme Court could not be "relitigated" and, therefore, Petitioner was estopped to present these witnesses. Id. at 20-21. Petitioner was instructed that any evidence these

witnesses had concerning Petitioner's reputation for honesty, the central issue under review, should be submitted by written affidavit, rather than by personal testimony. Id.

Finally, the hearing officer rejected Petitioner's contention that he had not had a full and fair opportunity to litigate the matter of his reputation for honesty during the disbarment hearing. Id. at 40.

The revocation hearing proceeded on November 15, 16 and 26, 1984. During the hearing, Petitioner was denied any opportunity to attack the findings of the Arizona Supreme Court opinion of August 8, 1984. As a result of the hearing, Petitioner's real estate broker's license was revoked on January 16, 1985. Petitioner sought administrative review through the Superior Court of the State of Arizona, which affirmed the revocation on

July 28, 1985. Petitioner appealed the lower court's decision to the Court of Appeals of the State of Arizona, which affirmed the lower court's decision on July 24, 1986. A timely Petition for Review was denied on November 4, 1986.

IX.

ARGUMENT

A. The Arizona State Real Estate Department Denied Petitioner's Due Process Right To A Fair Hearing By Permitting The Offensive Use Of The Doctrine Of Collateral Estoppel, Whereby Petitioner Was Denied The Opportunity To Attack The Findings Of Fact Made By The Arizona Supreme Court In An Earlier Disbarment Hearing Involving The Petitioner.

The doctrine of collateral estoppel prevents an issue of ultimate fact that has once been determined by a valid and final judgment from being relitigated by the same party or parties in any future lawuit. United States v. Linetsky, 533 F.2d 192 (C.A.Fla. 1976), rehearing denied 540 F.2d 1086; Albert v.

Montgomery, 732 F.2d 865 (C.A.Ga. 1984); United States v. Green, 735 F.2d 1018 (C.A.Ill. 1984).

> "The desire for judicial economy rings loudly since without issue preclusion, a long and difficult trial may ensue. Yet notions of fairness are also heightened since crucial evidence was erroneously omitted from the prior case and since factors external to the case militate against the use of offensive estoppel."

Jack Faucett Associates, Inc. v. American Telephone and Telegraph Co., 744 F.2d 118 (C.A.D.C. 1984). Since under the doctrine of offensive collateral estoppel or issue preclusion, a party is precluded from relitigating identical issues that he has litigated and lost against another plaintiff, three conditions must be satisfied before one party can assert the doctrine against another:

> "(1) {T}he issue must have been actually litigated, that is contested by the parties and submitted for determination by the court.
>
> "(2) {T}he issue must have been "actually and necessarily determined

by a court of competent jurisdiction" in the first trial.

"(3) {P}reclusion in the second trial must not work an unfairness."

Id. at 125 (emphasis added). The courts have placed special importance on the issue of fairness in the use of collateral estoppel.

"Collateral estoppel is an equitable doctrine. Offensive collateral estoppel is even a cut above that in the scale of equitable values. It is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it... Its application is controlled by the principles of equity... {F}airness to both parties must be considered when it is applied."

Id. Judge Learned Hand stated in The Evergreens v. Nunen, 141 F.2d 927, 929 (2nd Cir. 1944), cert denied 323 U.S. 720, 65 S.Ct. 49, 89 L.Ed. 579 (1944):

"{I}f it be proposed to make any fact, decided in the first suit, an indisputable datum in the second, from which the winner may make all rational inferences, the loser's risks become enormously enlarged. It is difficult enough to know what other possible causes of action a fact found in the first suit will

later prove to be "ultimate"; but the field is at least somewhat restricted particularly because the causes of action to which it can apply are apt to be already in existence. But it is utterly impossible to set even the widest boundaries to the situations in which the facts found in the first suit may become relevant as data from which to determine any facts, "ultimate" in all future causes of action. Logical relevance is of infinite possibility; there is no conceivable limit which can be put to it. Defeat in one suit might entail results beyond all calculation by either party; a trivial controversy might bring utter disaster in its train. There is no reason for subjecting the loser to such extravagant hazards; unless the decisions compel us to go so far, we will not do so." (Emphasis added)

During the disbarment hearing in 1983, Petitioner sought to be represented by legal counsel. Unable to retain counsel until six days prior to the hearing, Petitioner sought a continuance in order for his counsel to prepare. Despite the voluminous record spanning several years, the Bar Committee denied Petitioner's requests. Petitioner's counsel entered a continuing objection to

the proceedings and failed to offer a defense because of his inability to prepare adequately in the time allotted. Counsel for Petitioner neither cross-examined the witnesses against Petitioner nor offered witnesses on his behalf.

During the hearing to determine whether his real estate broker's license should be revoked, Petitioner sought to have the hearing officer take judicial notice of the fact that issues presented in the disbarment hearing had not been "fully and fairly litigated". Nevertheless, the hearing officer denied Petitioner's requests to present evidence in controversion of the findings made during the hearing.

This Court has frequently been called upon to determine the proper use of the collateral estoppel doctrine. One case directly on point is Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1

L.Ed.2d 1356 (1957). In that case, a defendant, Schneiderman, sought to estop the government from prosecuting him for conspiracy to overthrow the government based upon the judgment of an earlier denaturalization proceeding wherein that court found that it could not be presumed merely by his membership in the Communist Party that he adopted an illegal interpretation of the Marxist theory. In rejecting Schneiderman's arguments, this Court stated:

> "* * * The argument is that the determinations made in the Schneiderman case are not wholly irrelevant to this case, even if they do not conclude it, and hence that petitioner should be entitled to an instruction giving those determinations such partial conclusive effect as they might warrant. We think, however, that the doctrine of collateral estoppel does not establish any such concept of "conclusive evidence" as that contended for by the petitioner. The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidenciary or "mediate" facts are concerned, the doctrine of collat-

eral estoppel is inoperative. * * *"

354 U.S. at 337-338, 77 S.Ct. at 1086-1087 (emphasis added; citations omitted).

Yates has been overruled only to the extent that it suggested that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of insufficiency of the evidence. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

The factors to be considered when applying the doctrine of collateral estoppel include the requirement that the issue decided in the prior adjudication be identical to the issue presented in the second action. Duncan v. Clements, 744 F.2d 48, 51 (8th Cir. 1984).

This is the very argument raised by Petitioner during the revocation hearing, during which he attempted to attack the findings of the Arizona Supreme

Court following his disbarment hearing: The issues sought to be proved at each hearing were not identical. Hence, the offensive use of collateral estoppel was improper and denied Petitioner his right of due process during the second hearing. The issues raised during the disbarment hearing were concerned with Petitioner's actions as an attorney at law. These included whether Petitioner used an action for punitive damages against a former client as harassment and intimidation in collecting his fees; whether his action in arranging an adoption had been tantamount to attempting to persuade a client to "sell" a baby; whether he had "retaliated" against a former client who disputed his bill (presumably by filing suit); whether he had acted unethically by recording telephone conversations with other attorneys; and whether he had deceived a trial court by placing two impeachments

tapes of telephone recordings in an envelope filed with the court when the tapes were, in fact, blank.

On the contrary, the issue raised during the revocation hearing dealt with Petitioner's reputation in the community for honesty. By accepting the opinion of the Arizona Supreme Court as conclusive evidence that Petitioner had a reputation for dishonesty in the community, the hearing officer misapplied the doctrine of offensive collateral estoppel and, therefore, denied Petitioner his fundamental right of due process.

B. Petitioner Was Denied Due Process By The Hearing Officer's Refusal To Issue Subpoenae At Petitioner's Request For Certain Witnesses Who Would Testify Concerning Petitioner's Reputation For Honesty, Because Those Witnesses Had Testified During The Disbarment Hearing.

At the time of the revocation hearing, Petitioner presented a list of 21 witnesses that he wished to subpoena for

testimony in his behalf. Among these were several witnesses who had testified during ths disbarment hearing. The hearing officer denied this request, stating that Petitioner was estopped to call them at the revocation hearing. In response to Petitioner's assertions that these witnesses would serve as character witnesses on his behalf, the hearing officer instructed that their statements should be submitted in writing. Since the nature of the proceeding was to determine the Petitioner's reputation for honesty, the failure of the hearing officer to subpoena these witnesses deprived Petitioner of his fundamental means of defense.

Among the witnesses sought to be subpoenaed, for instance, was the former husband of one of the witnesses at the disbarment hearing, who would testify that the witness had lied during the disbarment

proceeding. This evidence had not been discovered prior to the disbarment hearing. This witness needed the subpoena to arrange for time off from work to attend the hearing. Through the improper application of collateral estoppel, the hearing officer foreclosed Petitioner from presenting his defense on the issue of his reputation.

The denial of Petitioner's request for subpoenae resulted from an error in applying the offensive estoppel doctrine. The courts have noted that although "abuse of discretion" is the standard of review, it will not turn its eyes to errors that may have been committed. Jack Faucett Assocates, Inc. v. American Telephone and Telegraph Co., supra, at 126.

X.

CONCLUSIONS

Petitioner's fundamental right of due process was denied by the hearing officer's improper application of the doctrine of offensive collateral estoppel and by that officer's failure to issue subpoenae for witnesses requested by Petitioner on the ground that their testimony during the disbarment hearing foreclosed Petitioner from calling them to testify at the revocation hearing. As a result of this denial of due process, Petitioner has been unjustly deprived of his livelihood. Petitioner, therefore, respectfully requests the grant of a writ of certiorari to the Court of Appeals of the State of Arizona and the Supreme Court of the State of Arizona lifting the order affirming the revocation of Petitioner's real estate broker's license pending proper proceedings before the Arizona

State Real Estate Department, and, as justice dictates, order a review of my earlier Petition for Writ of Certiorari before this Court as cause No. 84-962.

RESPECTFULLY SUBMITTED this 31st day of March, 1987.

MANFRED R. WETZEL
3745 North 24th Street
Phoenix, Arizona 85016
(602) 264-5317
In Propria Persona

App. 1

APPENDIX A

February 2, 1987

United States Supreme Court
No. 1 First Street, N. E.
Washington, D. C. 20543

Dear Honorable Justices:

Enclosed is a Petition for Writ Certiorari. Needless to say, it is but a sketchy outline of the events that have taken place in my case.

I was not an important lawyer in the community except to some very ordinary people and people with small cases. Having a real estate background (and degree) I intended to practice real state law on a limited basis while engaging in the real estate business.

I acted as a trial lawyer while serving in the infantry from 1964 - 1966. I liked my duties but had been disabled and left the service in 1966 after 9 years of active and reserve time.

After I returned to Arizona a waitress came to me and asked for help. She had been crippled and was destitute. I took her case and won. Then, overnight, people began calling with small accident cases. There were so many of these people, I tried to help them all. The amazing thing is that I won almost every case. I didn't make much money, my best net for a year was somewhere around

$27,000.00. I was asked to run for our State Supreme Court and Congress. I appeared on T.V. regularly representing the conservative and Christian philosophies. In 1972 I opposed the Arizona Bar on the no fault insurance issue and won.

Finally, the insurance lawyers (many of them are in Bar positions) got after me. This is where this case begins. The record in my case will cause you to be appalled at what is taking place in Arizona among the Bar and judiciary. It is clear that our Bar has no interest in justice as it applies to me or anyone outside the ring of lawyers and judges who want to dominate everyone and everything. The majority of lawyers and judges here support my views but we don't run things.

Arizona needs your help. Please review my case and take action to correct the injustices we have suffered. If you do, so many of us will be so grateful and we will thank you for your kindness.

Very truly yours,

Manfred R. Wetzel

APPENDIX B

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED JUL 24 1986
GLEN D. CLARK, CLERK
By R. ORTEGON

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MANFRED R. WETZEL, Plaintiff-Appellant, v. ARIZONA STATE REAL ESTATE DEPARTMENT, a State Agency, Defendant-Appellee.	)	1 CA-CIV 8568 DEPARTMENT D OPINION

Appeal from the Superior Court of Mariocpa County
Cause No. C-539084

The Honorable Thomas W. O'Toole, Judge

AFFIRMED

Manfred R. Wetzel
Plaintiff-Appellant in Propria Persona
Phoenix

Robert K. Corbin, Attorney General
by Susan B. Lagerman
W. Mark Sendrow
Assistant Attorneys General
Attorneys for Defendant-Appellee Phoenix

G R A N T, Judge

In this appeal from a decision affirming the revocation of appellant's real estate broker's license by appellee, Arizona State Department of Real Estate (Department), two issues are presented: (1) whether the real estate commissioner improperly invoked the doctrine of collateral estoppel, and (2) whether the evidence sufficiently supports the revocation order.

The facts are not in dispute. Appellant, Manfred R. Wetzel, (Wetzel) was licensed as both an attorney and real estate broker in the State of Arizona. In 1978, the Supreme Court of Arizona suspended Wetzel's license to practice law

indefinitely. In the Matter of Wetzel, 118 Ariz. 33, 574 P.2d 826 (1978). The supreme court found that Wetzel had filed a complaint against a former client "merely for the purpose of harassing and maliciously injuring him" in violation of Disciplinary Rules 2-109(A)(1) and 7-102 (A)(1) of the Code of Professional Responsibility, rule 29(a), Rules of the Supreme Court, 17A A.R.S. (Hereafter, all citations of Disciplinary Rules refer to the Code of Professional Responsibility, rule 29(a), Rules of the Supreme Court, 17A A.R.S.) Id. at 35, 574 P.2d at 828. The court also found that Wetzel had sought punitive damages in several lawsuits filed to collect attorney's fees, although Wetzel knew that these punitive damage claims were unwarranted. The supreme court held that such behavior was

in violation of DR 2-109(A)(2) and DR 7-102(A)(2). Id. at 36, 574 P.2d at 828-29.

On January 7, 1981, the Supreme Court of Arizona re-admitted Wetzel to the practice of law. Subsequently, the supreme court ordered the disbarment of Wetzel in August, 1984. In the Matter of Wetzel, 143 Arix. 35, 691 P.2d 1063 (1984). The court found that Wetzel engaged in the following dishonest and unethical conduct:

(1) Wetzel sued a client for services which were neither authorized by nor rendered to the client. Also, Wetzel claimed punitive damages to harrass and intimidate the client knowing that the claims were not justified by the facts of the law.

(2) Wetzel attempted to solicit two clients to engage in unlawful baby selling.

(3) Wetzel violated an agreement to provide services for a set fee and retaliated against the client who disputed

Wetzel's bill.

(4) Wetzel acted unethically by recording telephone conversations with other attorneys.

(5) Wetzel purposely deceived the trial court by telling the judge that the had placed two impeachment tapes of recorded conversation in an envelope which was filed with the court. When ordered to produce the tapes during discovery, Wetzel admitted the tapes were blank.

Id. at 41-44, 691 P.2d at 1069-73.

On October 22, 1984, the Department filed a complaint against Wetzel based on the supreme court's suspension and disbarment orders. The Department sought the suspension or revocation of Wetzel's real estate license pursuant to A.R.S. §§32-2153(A)(5), 32-2153(B)(4) and 32-2153(B)(5).

A hearing was held on November 15, 16, and 26, 1984. The evidence against Wetzel presented by the Department

consisted exclusively of the two supreme court decisions. Wetzel attempted to subpoena many of the same witnesses who had testified against him in the state bar proceedings, all of the justices of the Supreme Court of Arizona, and certain superior court judges. The hearing officer refused to issue the subpoenas and further instructed Wetzel that he could not relitigate the bar matter in the real estate department proceedings. Wetzel did, however, introduce character witnesses to testify on his behalf.

Following the hearing, the hearing officer recommended that Wetzel's real estate license be revoked. Thereafter, the commissioner issued an order adopting the hearing officer's findings of fact and conclusions of law and revoking Wetzel's license.

Wetzel proceeded to file a motion for reconsideration. The Department also

moved for reconsideration. Wetzel's motion was denied, the Department's motion was granted. On February 25, 1985, amended findings of fact and conclusions of law were issued by the hearing officer. Pertinent to this appeal are the conclusions of law as follows:

> (1) The findings of the Supreme Court of Arizona In the Matter of Wetzel, No. SB-112-3, are taken as true for purposes of the proceedings. The court found that Mr. Wetzel engaged in deceitful conduct in dealings with his colleagues and the courts and that he has been dishonest, if not malicous, in his dealings with clients, colleagues and courts of the state. These findings relate only to Mr. Wetzel's activities in connection with the practice of law, and there is no evidence he has engaged in improper conduct with respect to his activities as a licensed real estate broker. However, because the duties and responsibilities of these respective professions are quite similar these activities constitute grounds for suspension and revocation of respondent's real state

broker's license pursuant to A.R.S. §32-2153(A)(5).

(2) To the extent that the activities which gave rise to disbarment from the practice of law tend to show that he is not a person of honesty, truthfulness and good reputation, grounds exist for suspension or revocation of his real estate broker's license pursuant to A.R.S. §32-2153(B)(4).

The commissioner issued an order nunc pro tunc adopting the officer's findings and conclusions. By order of March 1, 1985, the commissioner revoked Wetzel's license.

Wetzel then filed a complaint in superior court challenging the commissioner's order. The trial court reviewed the record and affirmed the revocation order. This appeal followed.

Wetzel first argues that the hearing officer improperly found that collateral estoppel precluded him from challenging the disbarment proceedings. In

the same vein, Wetzel alleges as error the hearing officer's reliance on the supreme court's findings to conclusively establish grounds for revocation of Wetzel's real estate broker's license. These arguments are without merit.

The key in deciding the effect of the supreme court judgments in the Department proceedings is the doctrine of collateral estoppel or issue preclusion. Traditionally, collateral estoppel precludes the relitigation of a fact or issue previously determined in a prior suit between the same parties or their privies. See Farmers Ins. Co. v. Vagnozzi, 138 Ariz. 443, 675 P.2d 703 (1983); Matusik v. Arizona Public Service Co., 141 Ariz. 1, 684 P.2d 882 (App. 1984). Under the modern view, the same party (mutuality) requirement has been

abandoned so that a party precluded from litigating an issue under the traditional rule, is also precluded from doing so with another, provided there was full and fair opportunity to litigate the issue in the first action. Restatement (Second) of Judgments §29 (1982). This modern trend has been accepted by the courts in Arizona, but has been limited tothe defensive use of the doctrine. Standage Ventures, Inc. v. State of Arizona, 114 Ariz. 480, 562 P.2d 360 (1977); Food for Health Co., Inc. v. 3839 Joint Venture, 129 Ariz. 103, 628 P.2d 986 (App. 1981); Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968). Defensive use of the doctrine occurs when a party defending a claim asserts a previous judgment to which it was not a party to preclude litigation by an opponent who was a party to the

prior determination. Food for Health, 129 Ariz. at 106-7, 628 P.2d at 364. In contrast, offensive use of collateral estoppel occurs when the party making a claim attempts to assert against its opponent findings made in a prior judgment to which it was not a party. Id.

It is undisputed that the Department invoked the suspension and disbarment judgments as a means to establish its claim that Wetzel had acted in violation of A.R.S. §§32-2153(A)(5), 32-2153(B)(4) and 32-2153(B)(5). The Department's use of the doctrine clearly then was an offensive one. We nevertheless think that the factual situation here calls for approval of the offensive use of the doctrine. And while we hesitate to depart from prior case law, for the reasons stated below we think that it should not control here.

The seminal Arizona opinion to reject the offensive use of collateral estoppel is Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968). In Spettigue, Division 2 of this court applied the rule of the Restatement (First) of Judgments §93 in rejecting the offensive use of the doctrine. Id. at 283-84, 445 P.2d at 559-60. The Spettigue court also expressed concerns that the adoption of the doctrine would: (1) incline plaintiffs to avoid joinder, only to take advantage of a successful action without risk; and (2) be unfair to defendants in that the rules of evidence and statutory or judicial presumption might differ from one forum to another. Id. at 288, 445 P.2d at 564. Additional Arizona decisions to reject the offensive use of collateral estoppel rely on Spettigue and in turn on the Restatement

(First) of Judgments §93. See, e.g., Standage Ventures, 114 Ariz. at 484, 562 P.2d at 364; Food for Health, 129 Ariz. at 106-7, 628 P.2d at 989-90.

Subsequent to the rule announced in Spettigue and followed by its progeny, the Restatement (Second) of Judgments (1982) was adopted. Section 29 sanctions both the offensive and defensive use of collateral estoppel by parties not involved in the previous determination:

> A party precluded from relitigating an issue with an opposing party ... is also precluded from doing so with another person unless the fact he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.

Restatement (Second) of Judgments §29 (1982).

The rationale for approving the offensive use of collateral estoppel is

explained in the comment to section 29 as follows:

> A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process. In the absence of circumstances suggesting the appropriateness of allowing him to relitigate the issue, there is no good reason for refusing to treat the issue as settled...

Restatement (Second) of Judgments §29, comment b (1982).

We think that application of the rule of the Restatement (Second of Judgments §29 is appropriate under the circumstances here. To the extent that Spettique was premised on the Restatement (First) of Judgments, the foundation of Spettigue has been eroded by the adoption of the Restatement (Second) of Judgments. Moreover, section 29 addresses the very concerns expressed by the Spettigue court; the restatement rule places several

conditions on the use of collateral estoppel including, (1) whether the person proposing its use could have been joined in the previous case; (2) whether the procedures in the forum could change the previous determination if the case were to be fully relitigated; (3) whether the previous determination is inconsistent with another determination of the same issue; and (4) whether the previous determination was collusively obtained, or based on compromises. The restatement further provides that each of these factors must be weighed before giving preclusive effect to a prior determination. The most important factor, however, is whether the party against whom preclusions is sought had a full and fair opportunity to litigate the issue in the

prior proceeding. See Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). But see Ferris v. Hawkins, 135 Ariz. 329, 660 P.2d 1256 (App. 1983) (doctrine of collateral estoppel is inapplicable where there exists some consideration overriding principles of fairness to a litigant).

Applying the rule of sction 29 and the conditions found therein to this case, we approve the Department's offensive use of collateral estoppel. First, the commissioner could not have joined his disciplinary action with the disbarment proceedings against Wetzel. Second, Wetzel had every incentive to defend himself in the disbarment proceeding to preserve his right to practice law. Third, the procedural safeguards are comparable in both

licensing proceedings. Fourth, the requirements of due process, such as notice of the charges and the rights to confront witnesses and present evidence, equally apply in both forums. In sum, we hold that the commissioner correctly gave preclusive effect to the disbarment orders.

Having resolved that the commissioner was entitled to rely on the supreme court findings, we now turn to address the second issue which is whether those findings constitute grounds for revocation of Wetzel's real state license pursuant to A.R.S. §32-2153(A)(5) and 32-2153(B)(4). We must affirm the agency's order as long as it is supported by substantial evidence. Howard v. Nicholls, 127 Ariz. 383, 621 P.2d 292 (App. 1980)

Upon this record, we find substantial evidence in support of the agency's finding that Wetzel is not a person of honesty, truthfulness and good reputation within the meaning of A.R.S. §32-2153(B)(4). Indeed, the finding of the supreme court in the disbarment proceedings indicate that Wetzel had acted dishonestly towards the court and maliciously towards other lawyers and clients. The findings of the supreme court also establish that Wetzel has been guilty of dishonest dealings in violation of A.R.S. §32-2153(A)(5). We are not holding that disbarment of an attorney necessarily means that the attorney is unfit to hold a real estate license. On this record, however, Wetzel's conduct toward the court, lawyers and clients reveals dishonesty justifying the revocation of his real estate license.

For the foregoing reasons, the judgment of the trial court is affirmed.

SARAH D. GRANT, Presiding Judge

CONCURRING:

J. THOMAS BROOKS, Judge

RICHARD M. DAVIS, Judge Pro Tempore

NOTE: Richard M. Davis was authorized to participate in this case by the Chief Justice of the Arizona Supreme Court pursuant to Ariz. Const. Art. VI, § 3 and A.R.S. §§ 12-145-47.

APPENDIX C

SUPREME COURT
STATE OF ARIZONA
201 West Wing State Capitol, 1700 West Washington
Phoenix, Arizona 85007

David R. Cole, Clerk

Diana K. Bentley Chief Deputy Clerk

November 5, 1986

RE: MANFRED R. WETZEL vs. ARIZONA STATE REAL ESTATE DEPT
Supreme Court No. CV-86-0480-PR
Court of Appeals No. 1 CA-DIV 8568
Maricopa County No. C-539084

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 4, 1986, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED

Justice Cameron did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 5th day of November, 1986.

DAVID R. COLE, Clerk

TO:
Manfred R. Wetzel
Hon. Robert K. Corbin, Attorney General - Attn: Patrick M. Murphy, Esq., Susan B. Lagerman, Esq., and W. Mark Sendrow, Esq.
Glen D. Clark, Clerk, Court of Appeals, Divison One, Phoenix

APPENDIX D

9571C;FFD84-282
BEFORE THE ARIZONA REAL ESTATE DEPARTMENT

In the Matter of the real estate broker's license of:	)	No. H-1719-JLD
MANFRED R. WETZEL	)	ORDER SUMMARILY SUSPENDING BROKER'S LICENSE
Respondent.	)	

Finding that the public welfare imperatively requires action in the matter before him concerning the real estate broker's license of Manfred R. Wetzel,

IT IS ORDERED that the real estate broker's license of Manfred R. Wetzel is hereby summarily suspended pending final determination of proceedings for revocation or suspension. A hearing on the question of revocation or suspension shall be promptly instituted and determined by the Real Estate Department.

DATED this 22nd day of October, 1984.

RICHARD B. NICHOLLS, Commissioner
Arizona State Real Estate Department

COMPLAINT

The Arizona Real Estate Department alleges as follows:

1. Manfred R. Wetzel (hereinafter "Wetzel") is presently, and at all times material to this complaint was, licensed as a real estate broker in the state of Arizona. That license will expire December 31, 1984.

2. At all times material to this complaint, Wetzel has also been licensed to practice law in the state of Arizona.

3. In 1978, the Supreme Court of Arizona suspended Wetzel's license to practice law. In the Matter of Wetzel, 118 Ariz. 33, 574, P.2d 826 (1978). See Exhibit A, attached hereto and incorporated herein.

4. Wetzel was readmitted to the practice of law, effective January 7, 1981.

5. Thereafter, Wetzel committed a series of acts which resulted in the State Bar of Arizona filing a second disciplinary proceeding against Wetzel. This proceeding resulted in an Order and Opinion by the Supreme Court of Arizona, dated August 8, 1984, disbarring Wetzel. In the Matter of Wetzel, SB-112-3 (filed August 8, 1984) attached hereto as Exhibit B and incorporated herein.

6. The Supreme Court in the Order and Opinion, dated August 8, 1984, found that:

> The evidence is clear and convincing that respondent's license to practice law must be revoked. He has shown that he is unwilling or unable to act within the confines of the law and professional ethics when it is not in his tactical, pecuniary, or personal interest to do so. He has been dishonest, if not malicious, in his dealings with clients, colleagues, and the courts of this state. His written and oral arguments are fraught with paranoia and distrust of anyone who disagrees with him. In a legal system which relies on the integrity of lawyers to provide honest, forthright adversarial representation as a means

> to achieving truth and justice, we demand that members of the bar provide nothing less. The record and respondent's actions before this Court overwhelmingly establish that he lacks the "qualities and respect for the judicial system which are necessary adjuncts to the orderly administration of justice."

Exhibit B. pp. 29-30.

7. Based on the foregoing, grounds exist under A.R.S. §§ 32-2153(A)(5), 32-2153(B)(4) and 32-2153(B)(5) to suspend or revoke Wetzel's broker's license.

WHEREFORE, on the basis of the above-noted violations, the Department requests:

(1) That Wetzel's real estate broker's license be summarily suspended, pursuant to A.R.S. § 32-2157(B), and that his license be suspended or revoked pursuant to the statutes and rules cited above and A.R.S. §§ 32-2153(A)(5), § 32-2153(B)(4); and § 32-2153(B)(5).

(2) That a civil penalty of $500 be assessed against Wetzel pursuant to A.R.S. § 32-2160.01 for each violation of Title 32, Chapter 20, Ariz. Rev. Stat. Ann.

Dated this 22nd day of October, 1984

SILVIA R. ARELLANO
Assistant Commissioner
Arizona State Real Estate Department
1645 West Jefferson Street
Phoenix, Arizona 85007

APPENDIX E

BEFORE THE ARIZONA REAL ESTATE DEPARTMENT

In the Matter of the real estate broker's license of: MANFRED R. WETZEL Respondent.	No. H-719 JLD O R D E R

The Commissioner, having carefully reviewed the entire file in this matter, including the Hearing Officer's Findings of Fact and Conclusions of Law, hereby specifically approves of and adopts said Findings of Fact and Conclusions of Law.

IT IS ORDERED revoking the real estate broker's license of MANFRED R. WETZEL.

The parties are advised that, pursuant to Rule R4-28-42, within fifteen (15) days after service of the Final Order, any aggrieved party may request a new hearing. Such request shall be in writing and shall be filed with the

Department as provided by Rule R4-28-01, and a copy shall be served upon all other parties to the hearing, including the Attorney General, if the Attorney General is not the party filing the claim of error. All Requests for Rehearing shall be based upon one or more of the grounds specified in Rule R4-281-42(B) and (C).

DATED this 16th day of January, 1985.

RICHARD B. NICHOLLS
COMMISSIONER

Copies of the foregoing Order, together, with copies of the Findings of Fact and Conclusions of Law, mailed this 16th day of January, 1985, to:

Susan B. Lagerman
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

Manfred R. Wetzel
3745 North 24th Street
Phoenix, Arizona 85016

/s/ Evelyn Bailey

BEFORE THE ARIZONA REAL ESTATE DEPARTMENT

In the matter of the real estate broker's license of:	No. H-719 JLD
MANFRED R. WETZEL	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Respondent.	

A hearing was held in this matter on November 15 and November 26, 1984, pursuant to a Notice of Hearing and Complaint which was properly noticed and dated October 22, 1984. The Commissioner also issued an Order Summarily Suspending Broker's License on October 22, 1984.

At the time and place set for hearing, the Department appeared represented by Assistant Attorney General Susan B. Lagerman and Department Investigator John L. Davis. The Respondent, Manfred R. Wetzel, appeared without counsel.

Testimony was heard at the hearing from the following witnesses:

1. Donald W. Hart

2. Thomas P. Druken
3. Patricia Root
4. Dr. William L. Whitlow
5. Honorable Jerry H. Glenn (Retired)
6. Ralph H. Knight
7. Lester C. Davidson
8. Honorable Howard V. Peterson
9. Mrs. Karen K. Ross
10. Rosalind Asbill
11. Col. Ross C. Wright (U.S. Army Retired)
12. Stephen J. Smith
13. Manfred R. Wetzel

All witnesses were duly sworn and testimony was elicited from them. The record was held open upon the request of the Respondent, for submission of additional character evidence by way of letters of reference. The time for such submissions having expired, all evidence has been received, the parties have rested

and the matter is submitted. The following Findings of Fact and Conclusions of Law are based upon a careful review of all of the evidence.

FINDINGS OF FACT

1. Respondent, Manfred R. Wetzel, is a real estate broker licensed in the State of Arizona, whose license will expire December 31, 1984.

2. At all times relevant to these proceedings, and until his disbarment on August 8, 1984, the Respondent was also licensed to practice law in the State of Arizona.

3. The Department bases its complaint upon two actions by the Arizona Supreme Court involving the Respondent's license to practice law, and the facts and circumstances which gave rise to the Supreme Court's actions.

The first, In the Matter of Wetzel, 118 Ariz 33, 574 P.2d 826 (1978), resulted in an order suspending Mr. Wetzel from the practice of law indefinitely, and assessing costs against Mr. Wetzel in the amount of $3,528.02. On January 7, 1981 Mr. Wetzel was readmitted to the practice of law by the Arizona Supreme Court.

The second, In the Matter of Wetzel, SB-112-3 (filed August 8, 1984) resulted in an order disbarring Mr. Wetzel from the practice of law in the State of Arizona.

Copies of the above-referenced opinions of the Arizona Supreme Court were attached to the complaint in this matter, as Exhibit A and B, and are hereby incorporated into the Findings of Fact in the instant matter by this reference.

4. In the 1984 disbarment proceedings, the Supreme Court of the State of Arizona

found, after an independent determination of the facts, that Mr. Wetzel "has not abandoned the tactics and unprofessional conduct that led to his prior suspension. Indeed, he has persisted in filing unfounded claims in order to harass and extort and has engaged in deceitful conduct in dealings with his colleagues and the courts. The evidence is clear and convincing that Wetzel has abused the right to practice law in this state and that the public interest requires that his license to practice be revoked." The Court, in its conclusion, states about Mr. Wetzel that "he has been dishonest if not malicious in his dealings with clients, colleagues, and the courts of this state." Further, the record in the disbarment proceeding and Mr. Wetzel's actions before the Supreme Court "overwhelmingly

established that he lacks the qualities of responsibility, candor, fairness, self-restraint, objectivity and respect for the judicial system which are necessary adjuncts to the orderly administration of justice."

The Arizona Supreme Court adopted the Findings of Fact, Conclusions of Law and Recommendation of Local Administrative Committee 5A, which the Disciplinary Board of the State Bar of Arizona had unanimously adopted. The Court concludes "that Respondent is unable or unwilling to act within the confines of the law and to conduct himself within a professional manner. He is therefore unfit to practice law."

The Supreme Court opinion treats numerous allegations of impropriety against Mr. Wetzel, including a pattern on

his part of adding large punitive damage claims to small legal actions in order to bring the claim in Superior Court and to intimidate and harass the defendants, many of whom were clients whom Mr. Wetzel had sued for non-payment of legal fees. The Court cites two specific cases, Buckley and Welliever, as examples of this practice by Mr. Wetzel.

The Court further found Mr. Wetzel to be guilty of "baby selling" in the Rose case, in violation of A.R.S. §8-126(C). In the Stormberg case, the Court found Mr. Wetzel had violated an agreement to provide legal services for a set fee, and of retaliating against a client who disputed the bill.

The Court further found that Mr. Wetzel improperly recorded telephone conversations with attorneys (including his own) and others.

The Court also found that Mr. Wetzel had purposefully deceived the Court in connection with the Nienstedt case, by informing the trial court that he possessed two tape recorded telephone conversations with the Nienstedts that proved his allegations, but later admitted that the tapes were blank. The Supreme Court characterizes this episode as perhaps Respondent's "most egregious misconduct."

6. At the commencement of the hearing, Mr. Wetzel requested that the undersigned issue some 21 subpoenas to individuals from whom he wished to elicit testimony. These persons included four judges and one Commissioner of the Maricopa County Superior Court, the Clerks of the Superior Court and Supreme Court, as well as the entire membership of the

Supreme Court of Arizona. The Respondent also requested that subpoenas issue to the complainants in the disciplinary proceedings before the State Bar of Arizona. These requests for subpoena were denied.

7. Mr. Donald W. Hart, an attorney with the Phoenix law firm of Jennings, Kepner and Haug, and a member of the State Bar Disciplinary Board, testified at the hearing, and introduced a certified copy of the report of the Local Administrative Committee for District 5A, with respect to Mr. Wetzel.

Mr. Thomas P. Druken, an Investigator for the State Bar of Arizona, testified about his role in investigating the complaints against Mr. Wetzel.

8. Ms. Patricia Root, a legal secretary who has worked for Mr. Wetzel,

testified that she observed him in his day-to-day relationships with clients in his office. She stated her opinion that Mr. Wetzel is a very honest person of high integrity, who has a very good reputation in the community. She has observed him in his role as a real estate broker, and believes he is well qualified and competent in that role. She, and many other persons she knows, would trust Mr. Wetzel with money and property.

9. Dr. William L. Whitlow, pastor of the Biltmore Bible Church, testified he has known Mr. Wetzel since 1967. He states Mr. Wetzel had done much charitable work for people unable to afford legal and brokerage services and has donated much time to the church. In his opinion, Mr. Wetzel has a very good reputation for honesty, and is a competent honest real estate broker.

10. Mr. Jerry H. Glenn, a retired judge of the Maricopa County Superior Court, has known Mr. Wetzel since 1967. He stated Mr. Wetzel had appeared before him on several occasions, including jury trials, and always did a good job. He believes Mr. Wetzel to have a good reputation in the legal community for truth and honesty and believes Mr. Wetzel should be allowed to retain his real estate broker's license. He has not read either of the Supreme Court opinions in the disciplinary proceedings involving Mr. Wetzel.

11. Mr. Ralph H. Knight, an attorney admitted to practice in Arizona, testified he has known Mr. Wetzel since 1967, and knows his reputation in the legal community to be good. He states he would trust Mr. Wetzel with his money and

property and believes he is a good and honest real estate broker.

12. Mr. Lester C. Davidson, an attorney not admitted in Arizona and a former senior research analyst for the Arizona Supreme Court, testified he has known Mr. Wetzel for almost ten years. He worked for Mr. Wetzel as a legal assistant, and has personal knowledge of certain of the incidents which gave rise to the State Bar complaints. He disagrees with the findings of the Supreme Court with respect to those matters, and considers Mr. Wetzel to be honest and fair, with an excellent reputation in the community.

13. The Hon. Howard B. Peterson, Judge of the Maricopa County Superior Court, testified he has known Mr. Wetzel since 1956 and has employed Mr. Wetzel in

a variety of real estate transactions. He believes Mr. Westzel's reputation for honesty and truthfulness to be excellent, and, until the issuance of the Department's summary suspension of Mr. Wetzel's license, had been involved in a real estate transaction with him. Judge Peterson stated his opinions are based upon almost 13 years of personal experience with Mr. Wetzel, and not upon the findings of the Supreme Court in the disciplinary actions.

14. Ms. Karen K. Ross testified that she has known Mr. Wetzel for four years, and retained Mr. Wetzel in adopting a baby. She stated he as very honest and thoughtful, and performed some valuable legal services for her without charge. She would trust him with her money and property, and believes he has a good reputation in the community.

15. Ms. Roslind Asbill, a licensed real state salesperson, and Mr. Wetzel's sister, stated her opinion that Mr. Wetzel is a competent real estate broker, and a person of honesty and high moral character.

16. Col. Ross C. Wright, a retired United States Chaplain, has known Mr. Wetzel for more than ten years. He has worked with Mr. Wetzel on political campaigns and in conducting financial seminars for various church organizations. He believes Mr. Wetzel to be honest, truthful and competent. He stated Mr. Wetzel has provided many legal services without charge for people who could not afford them.

17. Mr. Stephen J. Smith, who owns a heating and cooling company, has known Mr. Wetzel for approximately ten years. Mr.

Wetzel has represented him in the purchase and sale of real property, and he has referred several people to Mr. Wetzel.

18. Mr. Wetzel testified at the hearing on his own behalf. He is a graduate of Arizona State University and the University of San Diego Law School, where he graduated number six in his class. He served two years in the Army Infantry, was a commissioned officer, and member of the Arizona National Guard. He was honorably discharged in 1966 as a colonel in the special processing detachment, and is a disabled veteran. He opened a law practice, and handled many real estate transactions and condemnation cases as well as personal injury and other matters. He has also represented numerous real state brokers.

Mr. Wetzel has been a real estate licensee for almost 28 years, and no real estate client has ever filed a complaint against him. Nor has he ever been sued as the result of his role as a real estate licensee.

Mr. Wetzel stated his belief that his problems with the State Bar began in 1972, when he actively opposed certain legislative proposals put forth by the State Bar. He has had disagreements with attorneys who hold or have held official positions with the State Bar. He stated his belief that the Supreme Court ruled as it did because it had not considered all of the evidence with respect to the charges against him.

Mr. Wetzel emphasized he is a knowledgeable, experienced and competent real estate broker, and that the practice

of real estate is his principal source of income. He has never been complained against by any real estate client, and states he will continue to honestly and competently represent clients, should he be allowed to continue the practice of real estate. He submits that, although the allegations made by the Supreme Court are serious, none of his legal clients lost money in any of these cases, and he never cheated anyone.

CONCLUSIONS OF LAW

1. The findings of the Supreme Court of Arizona In the Matter of Wetzel, No. SB-112-3, are taken as true for purposes of these proceedings. The Court found that Mr. Wetzel engaged in deceitful conduct in dealings with his colleagues and the courts, and that he has been dishonest, if not malicious, in his

dealings with clients, colleagues, and the courts of this state. These findings relate only to Mr. Wetzel's activities in connection with the practice of law, and there is no evidence he has engaged in improper conduct with respect to his activities as a licensed real estate broker. However, because the duties and responsibilities of these respective professions are quite similar, these activities constitute grounds for suspension or revocation of the Respondent's real estate broker's license pursuant to A.R.S. §32-2153(A)(5).

2. To the extent that the activities which gave rise to the Respondent's disbarment from the practice of law tend to show that he is not a person of honesty, truthfulness and good reputation, grounds exist for suspension or revocation

of his real estate broker's license pursuant to A.R.S. §32-2153(D)(4).

RESPECTFULLY SUBMITTED this 14th day of January, 1985.

ROBERT N. BASS
HEARING OFFICER

APPENDIX F

MANFRED R. WETZEL
3745 North 24th Street
Phoenix, Arizona 85016
Phone: 264-5317

In Propria Persona

IN THE SUPERIOR COURT OF

THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MANFRED R. WETZEL, Plaintiff, vs. ARIZONA STATE REAL ESTATE DEPARTMENT, A State Agency, DEPARTMENT, A State Agency, Defendant.	No. C 539084 JUDGMENT AND ORDER RE: PLAINTIFF'S COMPLAINT ADMINISTRATIVE REVIEW, A.R.S. §12-901, et seq.

Based upon a review of the Plaintiff's complaint, and the record on appeal, filed May 17, 1985, and applicable

provisions of the Arizona Administrative Review Act, A.R.S. §12-901 et. seq.,

IT IS ORDERED denying Plaintiff's complaint and affirming the order of Real Estate Commissioner R. B. Nicholls, dated January 16, 1985, revoking Plaintiff's real estate license. Under the applicable scope and standard of review, A.R.S. §12-910 and Howard v. Nicholls, 127 AZ 383, 388 (App. 1980), the record on appeal before this Court clearly shows substantial evidence that the Plaintiff engaged in a pattern of dishonest and malicious conduct which is sufficient grounds for revocation of his real estate license. A.R.S. §32-2153 (A)(5), (B)(4) and (B)(5). In addition, the Court finds that the action taken by the Real Estate Department in revoking Plaintiff's license was within the scope of its statutory

authority and therefore proper. Furthermore, the hearing officer correctly ruled that the Plaintiff could not introduce substantive evidence to contradict the Supreme Court decisions which formed the basis of the license revocation. These judicial decisions collaterally estopped Plaintiff from challenging them in the subsequent administrative revocation proceeding. Neinstadt v. Wetzel,113 AZ 348, 355 (App. 1982).

IT IS FURTHER ORDERED denying Plaintiff's renewed Motion for Stay of the January 16, 1985, Order revoking his real estate license. Based upon the Court's review of the record on appeal, and its decision denying Plaintiff's complaint and affirming the decision of the Real Estate Commission revoking his license, the

Plaintiff has failed to show any good cause, as required by A.R.S. §12-911(A), for staying the revocation order pending further proceedings in this matter.

Dated: _____,

1985.

_____
HON.THOMAS W. O'TOOLE
Judge of the Superior Court

Copy of the foregoing mailed
this 27th day of June, 1985, to:

SUSAN B. LAGERMAN
Assistant Attorney General
1275 West Washington Street, Room 259
Phoenix, Arizona 85007

_____
MANFRED R. WETZEL

(2)

Supreme Court, U.S.
FILED
MAY 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1632

UNITED STATES SUPREME COURT

October Term, 1987

MANFRED R. WETZEL,
Petitioner,

-vs-

ARIZONA STATE REAL ESTATE DEPARTMENT
Respondent,

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

W. MARK SENDROW
Assistant Chief Counsel
Financial Fraud Division
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)255-3702

Attorneys for Respondents

QUESTIONS PRESENTED

1. IS THERE A CONFLICT BETWEEN THE ARIZONA COURT OF APPEALS DECISION APPROVING THE OFFENSIVE USE OF COLLATERAL ESTOPPEL AND PRECEDENTS OF THIS COURT?

2. DOES THE FACT INTENSIVE NATURE OF THE DISPUTE BETWEEN PETITIONER AND THE STATE OF ARIZONA MAKE THIS CASE UNSUITABLE FOR REVIEW UNDER THIS COURT'S CERTIORARI JURISDICTION?

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STATEMENT OF THE CASE

Petitioner, Manfred R. Wetzel, challenges a decision of the Arizona Court of Appeals affirming an order of the Arizona Real Estate Commissioner revoking his real estate broker's license.

The petitioner was licensed in Arizona both by the Real Estate Commissioner as a broker and by the Arizona Supreme Court as an attorney. Following petitioner's disbarment by the Arizona Supreme Court in 1984, the Real Estate Commissioner commenced an action to revoke his broker's license, based on the same acts which led to petitioner's disbarment, as set forth In the Matter of Wetzel, 118 Ariz. 33, 574 P.2d 826 (1978) and In the Matter of Wetzel, 143 Ariz. 35, 691 P.2d 1063 (1984), cert. denied, 469 U.S. 1213, 105 S.Ct. 1184, 84 L.Ed. 2d 331 (1985).

Following a hearing held in November of 1984, the Real Estate Commissioner entered an order, dated March 1, 1985, revoking petitioner's real estate broker's license. Petitioner appealed to the Superior Court of Arizona for Maricopa County, which affirmed the Commissioner's order on July 15, 1985. An appeal to the Arizona Court of Appeals followed which also affirmed the order of revocation. Wetzel v. Arizona State Real Estate Department, Ariz. , 727 P.2d 825 (App. 1986). The Supreme Court of Arizona denied a petition to review on November 4, 1986.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE ARIZONA COURT OF APPEALS DECISION APPROVING THE OFFENSIVE USE OF COLLATERAL ESTOPPEL AND PRECEDENTS OF THIS COURT.

The Arizona Court of Appeals in affirming the revocation of petitioner's real estate broker's license adopted as Arizona law Section 29 of the Restatement (Second) of Judgments. That section sanctions the defensive and offensive use of collateral estoppel by parties not involved in the prior litigation. The Court of Appeals decision rejected Arizona precedent which prohibited the offensive use of collateral estoppel. Wetzel v. Arizona State Real Estate Department, Ariz. , 727 P.2d 825 (App. 1986).

The Court of Appeals held that a party may use prior findings for offensive purposes subject to several conditions, of

which the most important is that the person against whom preclusion is sought had a full and fair opportunity to litigate the issue. Wetzel v. Arizona State Real Estate Department. The rule adopted by the Arizona Court of Appeals in this case is consistent with this Court's decision on the use of offensive collateral estoppel. Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). See also, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971) (Approving the use of collateral estoppel defensively in a patent case).

There appear to be no cases which prohibit the application of collateral estoppel on federal constitutional grounds. Since the Arizona Court of Appeal's adoption of Section 29 of the

Restatement (Second) of Judgments does not raise a constitutional question, the petition for writ of certiorari should not be granted.

II.

THE FACT INTENSIVE NATURE OF THE DISPUTE BETWEEN PETITIONER AND THE STATE OF ARIZONA MAKES THIS CASE UNSUITABLE FOR REVIEW UNDER THIS COURT'S CERTIORARI JURISDICTION

Another factor makes this case unsuitable for review by petition for writ of certiorari. Since the legal standard adopted by the Arizona Court of Appeals is constitutional, the only question left for this Court is whether it was applied constitutionally. Under these circumstances, petitioner's entitlement to relief would rest on this Court's review of the factual determinations made by the Arizona Real Estate Commissioner and Courts.

The fact intensive issues which petitioner is requesting this Court to

adjudicate are whether the Real Estate Commissioner abused his discretion in refusing to allow petitioner to relitigate certain factual issues, and whether the State Bar of Arizona and Supreme Court afforded petitioner a full and fair opportunity to a hearing in his disbarment proceedings. In effect, petitioner is asking this Court to exercise appellate rather than certiorari jurisdiction. Such would be inappropriate exercise of the Court's certiorari jurisdiction over state courts. See, Rule 17, Supreme Court Rules, Title 28 U.S.C.

CONCLUSION

The petition for writ of certiorari should be denied. The Arizona Court of Appeal's decision adopted a collateral

estoppel rule which is consistent with decisions of this Court. Granting the petition for writ of certiorari would require this Court to evaluate factual determinations made by Arizona Courts and an administrative agency. Such determinations would not be a proper application of this Court's certiorari jurisdiction.

RESPECTFULLY SUBMITTED this 13th day of May, 1987.

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No. 86-1632

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MANFRED R. WETZEL,

Petitioner,

v.

ARIZONA STATE REAL ESTATE DEPARTMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF ARIZONA

PETITIONER'S REPLY BRIEF

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In Propria Persona

QUESTIONS PRESENTED FOR REVIEW

A. DOES THE FACT-INTENSIVE NATURE OF THE DISPUTE BETWEEN THE PETITIONER AND THE STATE OF ARIZONA DEPRIVE THIS COURT OF CERTIORARI JURISDICTION TO REVIEW THE STATE'S APPLICATION OF THE DOCTRINE OF OFFESIVE COLLATERIAL ESTOPPEL?

B. DOES THE APPROVAL BY THIS COURT OF THE ADOPTION OF THE DOCTRINE OF THE OFFENSIVE USE OF COLLATERAL ESTOPPEL RELIEVE THE STATE OF ARIZONA FROM THE CONSTITUTIONAL REQUISITES OF DUE PROCESS IN APPLYING THAT DOCTRINE?

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Other Authorities:

Rule 17, Supreme Court Rules, Title 28 U.S.C. 4,6

IV.

INTRODUCTION

Following his disbarment by the Supreme Court of the State of Arizona, Petitioner, Manfred R. Wetzel, received a notice of the summary suspension of his real estate broker's license. The grounds cited in the formal complaint for permanent revocation included only the Arizona Supreme Court's opinion in the disbarment matter. At no time was the Petitioner accused of any misconduct in his real estate dealings. Nevertheless, the Arizona State Real Estate Department, Respondent herein, alleged that Petitioner's disbarment conclusively proved that Petitioner lacked a good reputation for honesty in the community, and, therefore, that Petitioner's broker's license should be permanently revoked.

At the hearing on the revocation matter, held on November 15, 16 and 26,

1984, Petitioner was denied the opportunity to attack the findings of the Arizona Supreme Court, despite his offer of proof of previously unavailable evidence that a witness at the disbarment hearing had lied. Furthermore, Petitioner was denied subpoenae for witnesses he wished to call on his own behalf on the issue of his reputation for honesty in the community. The basis for the denial was solely that these witnesses had testified during the disbarment hearing, although none of the witnesses had testified on the issue of Petitioner's reputation. Since that issue was the sole ground for revocation of Petitioner's broker's license, the denial of those subpoenae was an abuse of the doctrine of offensive collateral estoppel and a denial of his right of due process. It is on these grounds that Petitioner seeks a writ of certiorari from this Court.

V.

ARGUMENT

Respondent requests a denial of the writ on two grounds: (1) that the Arizona Court of Appeals' approval of the offensive use of collateral estoppel is not inconsistent with the precedents of this Court; and (2) that the fact-intensive nature of the dispute between the parties makes this case unsuitable for review under the Court's certiorari jurisdiction. Both of these grounds are completely unresponsive to the issues, and both are without merit. Logic dictates that these arguments be addressed in the reverse order.

A. THE FACT-INTENSIVE NATURE OF THE DISPUTE BETWEEN THE PETITIONER AND THE STATE OF ARIZONA DOES NOT DEPRIVE THIS COURT OF CERTIORARI JURISDICTION TO REVIEW THE STATE'S APPLICATION OF THAT DOCTRINE.

Respondent would have this Court deny certiorari because of what it terms

"the fact-intensive nature of the dispute" between the parties. However, nothing in this Court's power of certiorari jurisdiction over state court decisions limits that jurisdiction to only "fact-simple" cases. Rule 17, Supreme Court Rules, Title 28, U.S.C.

In any event, Petitioner has at no time sought to have this Court review the facts of this case, and he does not seek to do so here. In fact, the recitation of facts in Petitioner's opening brief is extremely simplified in light of the voluminous record in this case, which spans nearly 10 years.

The real issue on appeal is whether the offensive use of collateral estoppel: (1) may deprive a party of the right to present evidence during a second action which was not available to him during the first and which may have resulted in a different outcome in the first action had

it been available; and (2) may deprive a party of the right to subpoena witnesses on his behalf in a second action solely because they testified in the first action, irrespective of the fact that they were not called upon to testify on identical issues. As described more fully in Petitioner's Statement of the Case in the Petition for Writ of Certiorari, page 2, these are the very abuses of the doctrine which led to the revocation of Petitioner's real estate broker's license without the fundamental right of due process.

Rather than depriving this Court of certiorari jurisdiction, Respondent's concession of the fact-intensive nature of the matter points out one reason for the need for this Court to clarify its guidelines for the constitutional bounds of the use of the equitable doctrine of offensive collateral estoppel. Particularly where

there are so many facts for consideration, due process demands that an individual's right to a full and fair hearing not be unjustly abridged by the state.

Rule 17(1)(c), Supreme Court Rules, addresses the appropriateness of this Court's review "{w}hen a state court . . . has decided a federal question in a way in conflict with applicable decisions of this Court." As discussed more fully in part B of this argument, some guidelines have been set forth in this Court's earlier decision of Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 99 S.CT. 645, 58 L.Ed.2d 552 (1979) on the appropriate use of offensive collateral estoppel. Those guidelines adopt a fairness concept ignored by Respondent during the Petitioner's revocation hearing.

At stake here was the source of Petitioner's livelihood and that of his

family. More important, however, is the potential for further abuses against future litigants.

By way of example as to intensity a few of the facts involved are:

1. Mr. Hart, the chairman of the Bar Committee is a partner of Mr. Kepner. They run an insurance defense firm handling many workmen's compensation cases. On a case called Goins, the trial of which started late because the hearing officer was eating breakfast with Mr. Kepner, the hearing officer as a first matter of business took Petitioner, Wetzel, into a separate courtroom with no one present but the hearing officer and Mr. Kepner. Mr. Kepner began to berate Petitioner by calling him a crook, etc. The hearing officer then took his turn berating Petitioner, the Court of Appeals, and the Arizona Supreme Court. These men work together to cheat innocent people out

of their benefits and appear to have the system rigged. Petitioner was caught off guard by this conduct. The trial then commenced in the regular courtroom and a record was made by Petitioner. Half-way through the trial, Petitioner made a motion for a mistrial based on the court's conduct--the motion was miraculously granted. If this Court read that record, you would be appalled at what went on in the name of Justice. Petitioner's conduct in that matter is above reproach.

Just prior to the retrial some time later, Petitioner received a call from another partner of Mr. Kepner, a Mr. Cunningham, claiming that Goins had threatened to murder Mr. Kepner and Mr. Cunningham who would try the case. Petitioner received a call from the presiding judge of the Maricopa County Superior Court who had also received such calls as had the State Governor's Office.

Mr. Goins had had his face crushed in and his eyes could not focus. He needed extensive surgery. There was no doubt the case was compensable. He knew the trial by Kepner had been crooked. After the retrial, Mr. Cunningham told Petitioner the case should never have been tried because it was obviously compensable on its face. A few days following the trial, Kepner filed another denial of claim. This meant that Goins would have to have another trial, even though he had not yet had the surgery. The hearing officer then put his foot down--right on Kepner's conduct. This accounts in part for the hatred of Mr. Hart and explains why his partners had, prior to the Bar hearing involving Petitioner, made defamatory statements about Petitioner, on and off the record.

Further regarding Mr. Hart, Petitioner had requested that a self-appointed

political and professional "enemy" not sit on the Bar Committee as chairman since he and his firm had been making derogatory statements about Petitioner's ethics and honesty after Petitioner had exposed the firm for its corrupt practices before the Industrial Commission of Arizona. Mr. Hart should not have been on the Bar Committee that heard Petitioner's case. Less biased lawyers would have given Petitioner's attorney time to prepare. Even the Bar summons to Petitioner said he should "respond" in 30 days, and gave no indication that there would be a trial before or at the time the answer was due. Petitioner's attorney called a few days before the 30-day period to answer expired and asked for a few more days to respond (file his written answer), and was told that the 30 days was not for a written answer, but that the trial would begin

then. Looking at that portion of the record, one cannot see any trace of what we, as Americans, traditionally consider to be fair or just.

2. In the 1978 suspension, the word from the Bar Committee was first that Petitioner would receive a censure. Then a month or two later, it was changed to a reprimand. The chairman of that committee wanted to withdraw because he had a conflict. Without advising Petitioner, who had protested to the chairman, Petitioner's attorney told the chairman to stay on since he and the chairman were close friends. Later the reprimand was changed to a 30-day suspension, and so on. Finally, after a year or so of this sort of playing around, Petitioner was suspended indefinitely and was told that it wasn't because he had done anything wrong, but the defense firms just wanted him to play the game and settle cases.

The jist was, why should Petitioner try cases when he could agree to settle and make a fast buck without working so hard? Anyone who knows Petitoner would know that this would increase his unyielding resolve to fight for justice for the little guy. When talking to the Bar prosecutor at a restaurant a few months after the suspension, Petitioner was advised by the prosecutor that the Bar matter was "a dirty deal" and "a rotten mess" and he (the prosecutor) was ashamed of it.

When Petitioner was re-admitted, you would have thought he was a long, lost relative of those who had suspended him. Petitioner can still feel some of the back-slapping. It was like saying, "Okay, you've got the message; now let's settle cases fast and forget about the duty to do your best for your client." What the Bar did in that case was to refer to 50 or so collection and assorted cases filed by

Petitioner on behalf of himself and clients. The Bar considered only 4 or 5 of those cases. They involved allegations of fraud and prayers for exemplary damages. Petitioner's conduct in the other 45 cases was not questioned. Petitioner believed and his attorney advised him that his conduct was proper in all matters involved.

3. In the 1984 disbarment, the Bar prosecutor is the brother of the head of a firm that represented Petitioner in a case prior to the disbarment which has been referred to in the Bar opinion. In that case, the firm lost transcripts of depositions. The transcripts proved beyond any doubt that Petitioner's opponents in the case were lying. However, the attorney for Petitioner spent a total of 15 minutes getting ready for trial and did not discover that he had lost the transcripts until after the trial started.

Before the trial, he indicated that all the preparation he needed was to read the interrogatories submitted to the other side. He thought the trial was going to be continued. Being unprepared, he lost the case and Petitioner was held chargeable for a money judgment. Now, with this type of negligence over its head, the firm made a few feeble threats to sue Petitioner for a portion of the fees it had billed Petitioner. Petitioner was in a dilemna--either pay the judgment and forget the matter or request that the firm handle the appeal, and if the appeal was lost the firm could pay for it's negligence. The firm decided to appeal claiming a 95% chance of winning on appeal. The appeal was lost. The matter was resolved by Petitioner by paying a $70,000 judgment and paying the law firm nothing. Later the brother of the firm's senior partner prosecuted the disbarment

action against Petitioner. Further, the prosecutor's father was a witness against Petitioner.

4. With reference to the two blank tapes, eleven tapes existed. Impeachment tapes were not discoverable. Two blank tapes and some written items were placed in an impeachment envelope and filed with the court prior to trial. On discovery the court felt that the defendants should be able to hear the tapes. Petitioner advised the court in camera that the envelope contained two blank tapes that would be substituted for live tapes later. On a motion for sanctions, the lawyers for the defendants lied to the court and told him all the tapes were blank when in fact they had spent an afternoon recording the eleven. Based on their lies, the judge exploded. Petitioner's case was dismissed and Petitioner's lawyer thought that was the end of the matter and it wasn't worth pursuing further.

4. At the real estate hearing before the Respondent herein, Petitioner presented two judges, two lawyers, community business leaders, a minister, a chaplain and other people to attest to his honesty and that he had a good reputation in the community. The Respondent put in no testimony to controvert these live witnesses or their testimony other than the written disbarment opinions of the Arizona Supreme Court. When the case advanced to the point where Petitioner would call witnesses or to present documentary evidence to prove he was innocent of the findings of the Bar Committee, he was not allowed to call those witnesses. He was deprived of the right to prove his innocence. The offer of proof he made at the time is a stark testimonial against this unfair denial of due process. Punctuating the injustice is the hearing officer's finding which says,

". . . there is no evidence he has engaged in improper conduct with respect to his activities as a licensed real state broker."

The substance of some of the only live evidence of Petitioner's reputation is set forth by the same hearing officer as follows:

"Mr. Wetzel has been a real estate licensee for almost 28 years, and no real estate client has ever filed a complaint against him, nor has he ever been sued as the result of his role as a real estate licensee."

". . . he is a knowledgeable, experienced and competent real state broker, and that the practice of real estate is his principal source of income. He has never been complained against by any real estate client, and states he will continue to honestly and competently represent clients, should he be allowed to

continue the practice of real estate. He submits that, although the allegations made by the Supreme Court are serious, none of his legal clients lost money in any of these cases, and he never cheated anyone."

These are but a few of the facts from a situation that upon looking at the entire record in both cases (the disbarment and the real estate matter) is definitely fact-intensive. Therefore, the facts cited here are sketchy. A full review of both cases would show a more thorough and accurate account of the wrongs done to Petitioner.

It seems Petitioner is denied the right to prove his innocence. A basic duty of a judge or court is to correct a wrong when it comes to its attention. Would this Court please consider reviewing the record in this matter and the prior disbarment and grant the relief requested

in both cases? It is this very fact-intensive nature that screams out for review by this Court in certiorari.

B. THE APPROVAL BY THIS COURT OF THE ADOPTION OF THE DOCTRINE OF THE OFFENSIVE USE OF COLLATERAL ESTOPPEL DOES NOT RELIEVE THE STATE OF ARIZONA FROM THE CONSTITUTIONAL REQUISITES OF DUE PROCESS IN APPLYING THAT DOCTRINE.

Respondent would have this Court deny the writ because the State's adoption of the offensive use of collateral estoppel is not inconsistent with the precedents of this Court. This position fails to address the true issue presented to this Court for review, namely whether the State provided Petitioner the fundamental constitutional requirement of due process by the manner in which the doctrine was applied in this case.

1. RESPONDENT HAS FAILED TO CITE EVEN A SINGLE CASE IN SUPPORT OF THE DENIAL OF PETITIONER'S RIGHT TO PRESENT CERTAIN WITNESSES AND EVIDENCE ON HIS OWN BEHALF DURING THE REVOCATION HEARING BEFORE THE REAL ESTATE COMMISSIONER.

Respondent's brief is strikingly devoid of even a single citation in support of Respondent's use of offensive collateral estoppel to: (1) deprive Petitioner of the use of evidence at the revocation hearing that was unavailable to him during the disbarment hearing and which testimony might have led to a different result had it been available; or (2) to deny him the grant of subpoenae for witnesses he sought to call at the revocation hearing on the issue of his reputation for honesty, solely on the ground that those witnesses testified at the disbarment hearing, even though the substance of the testimony was not necessarily identical. Petitioner respectfully suggests that no case law exists which approves such abuses of the offensive use of collateral estoppel, and that these abuses amounted to a denial of

Petitioner's right to due process during the revocation hearing.

Furthermore, Respondent has failed to distinguish even one of the cases cited by Petitioner in his opening brief. Petitioner respectfully submits that no such distinction can be made.

2. RESPONDENT HAS MISSTATED THE ISSUE BEFORE THIS COURT IN AN ATTEMPT TO DIVERT THE COURT'S ATTENTION FROM THE RESPONDENT'S UNJUST ABUSES OF THE DOCTRINE OF OFFENSIVE COLLATERAL ESTOPPEL.

Respondent has cited on its behalf Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 99 S.CT. 645, 58 L.Ed.2d 552 (1979) and Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 92 S.CT. 1434, 28 L.Ed.2d 788 (1971). Those cases approve the offensive and defensive use, respectively, of collateral estoppel by non-parties to the first action. Those doctrines are not in question here.

Respondent further cites the very Arizona opinions Petitioner seeks to have this Court review.

None of this, however, addresses the issues presented to this Court by the Petitioner, namely, that the manner of Respondent's use of the doctrine deprived Petitioner of his fundamental right of due process during the revocation hearing.

This Court has previously addressed the appropriate use of the doctrine of offensive collateral estoppel which incorporates the concept of fairness to the party against whom it is asserted. Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 331, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979) outlines a number of considerations this Court deems relevant to the use of the doctrine. In footnote 15, for example, the Court stated:

> "If, for example, the defendant in the first action was forced to defend

> in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted. Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties . . . The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action." (Emphasis added, citations omitted.)

To reiterate from Petitioner's opening brief, Petitioner sought a continuance of the disbarment hearing because, despite diligent attempts to retain counsel to represent him, he was unable to do so until just six days before the hearing. The continuance was denied, however, and the hearing proceeded despite Petitioner's inability to adequately prepare. Furthermore, evidence of perjured testimony during the disbarment hearing did not become available to Petitioner until after the disbarment was ordered by the Arizona

Supreme Court. In light of these difficulties, the use of collateral estoppel against Petitioner denied him his fundamental right to due process. The approval of the application of collateral estoppel in this case by the Arizona Court of Appeals, therefore, conflicts with the prior decisions of this Court concerning the appropriateness of such use. Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

VI.

CONCLUSION

The cursory and unresponsive manner in which Respondent answered Petitioner's opening brief is indicative of the overall callousness and injustice with which Respondent has seen fit to deprive Petitioner and his family of the source of their livelihood.

Used correctly, the doctrine of collateral estoppel is an important and appropriate tool to protect parties from the burden of re-litigating previously resolved issues and to prevent the waste of resources, all to the detriment of the parties involved, other litigants and taxpayers. As important as these considerations are, however, they cannot surmount an individual's right to due process. The doctrine cannot be interpreted so as to allow a state agency to deprive a party of his livelihood without due process of law.

Petitioner respectfully renews his request that this Court grant a writ of certiorari because of the far-reaching implications of this matter. By preventing further abuses of the doctrine, this Court will protect future litigants and their families from the same unjust deprivation of the source of their

livelihood as that faced by the Petitioner and his family.

Petitioner, therefore, respectfully requests the grant of a writ of certiorari to the Court of Appeals of the State of Arizona and the Arizona Supreme Court lifting the order affirming the revocation of Petitioner's real estate broker's license pending proper proceedings before the Arizona State Real Estate Department.

RESPECTFULLY SUBMITTED this 27th day of May, 1987.

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